

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION.

Criminal Miscellaneous Case HAM No. 201 of 2014.

ATISH KUMAR

v

STATE

Counsel: Mr. G. O'Driscoll for the Applicant.
Ms. J. Prasad for the State.

Date of hearing: 15, 18 December 2014,
11 February 2015.

Date of Judgment: 5 March 2015.

JUDGMENT
APPLICATION FOR STAY

By way of Notice of Motion and accompanying Affidavit in support, the Applicant applies that a charge laid by the DPP against him be quashed on the basis that it charges an offence unknown to Fiji Law and in the alternative that the proceedings against him be stayed on

the basis that a conspiracy cannot be charged along with a substantive offence.

2. An amended charge sheet filed in the Magistrates Court at Suva charges the applicant with the following offence:

Statement of Offence

CONSPIRACY TO COMMIT A MISDEMEANOR
contrary to section 386 of the Penal Code, Cap17

Particulars of Offence

SHAINAZ MOHAMMED and **ATISH KUMAR** on the 13th of March, 2009 at Suva in the Central Division conspired together to commit a misdemeanor namely, corruptly obtaining money from **SANJAY KUMAR LAKHAN, SUDESH KUMAR** and **KRISHNAL SINGH** as an inducement or reward for issuing New Zealand Visitors Visa to the said **SANJAY KUMAR, SUDESH KUMAR, SANJYAN** (sic) **KUMAR** and **KRISHNAL SINGH** on their Fiji Passports.

3. There is an obvious problem with the various names particularized in the charge but that is not the point of the application.
4. The applicant argues first that the offence charged cannot be sustained in law because he does not fall within the definition of "agent" as it is defined in s.375 of the Penal Code.
5. Section 386 (the charge section) reads:

"386. Any person who conspires with another to commit a misdemeanor or to do any act in any part of the world which if done in Fiji would be a misdemeanor, and which is an

offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanor.”

- 6. The charge does not specify in the Statement of Offence which misdemeanor the pair are accused of conspiring to commit, but the particulars and the submissions of the State relate to corrupt practices which are provided for in section 376 (a) of the Penal Code. Because the within application centres on an interpretation of that section, it is necessary to reproduce it here. It reads:

“**376.** If-any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal’s affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business ; or
.....
.....
he is guilty of a misdemeanor, and is liable to imprisonment for two years or to a fine of (six penalty units).”

- 7. That section is further defined by section 375 which reads:

“**375 - (1)** For the purposes of this Chapter, the expression “consideration” includes valuable consideration of any kind; the expression “agent” includes any person employed by or acting for another; and the expression “principal” includes an employer.

(2) A person serving under the Crown or under any town council or under any other public body having power to impose rates or entrusted with the expenditure of any Government funds or grants, and a member of any such town council or other public body, is an agent within the meaning of this Chapter. “

8. The Applicant argues that for the charge to be valid , he must “fall within the class of persons defined in section 375(2) above.” He further argues that his co-accused who was a receptionist at the New Zealand High Commission was not an agent either because that Commission is not an organ of the State.
9. This submission is misconceived on several counts. Neither counsel has seen fit to explain to this court what the purported role of the applicant was in this enterprise but it is irrelevant. There is no doubt that the definition provided in s.375(2) of the Code is not exhaustive. The main definition of agent is provided in s.375(1) (any person employed by or acting for another) and the various official agencies referred to in s.375(2) are but additional and explanatory categories of agent over and above the very wide original definition. A receptionist for any company, professional practice or commercial entity is of course an agent for her principal, her employer.
10. The charge is one of conspiracy and the crime is made out of course when agreement has been reached that an agent will obtain visa approvals in consideration of money paid. The applicant need not be an agent himself; there need only be evidence of the agreement that the agent (his co-accused) will act corruptly to the benefit of both.

11. The application for stay on the basis that the charge is defective is misconceived and it is dismissed.
12. **In the alternative**, the applicant submits that a conspiracy and a substantive charge cannot be laid on the same charge sheet. Whilst it has been held that to so charge is undesirable, it is certainly not proscriptive. (**Bhika** (2008) FJHC 179, Shameem J. (18 August 2008))
13. In any event the applicant is not charged with both a substantive offence and a conspiracy. He is charged with a conspiracy alone.
14. This application may perhaps be arguable in the case of his co-accused who is charged with both, but she did make such application which was refused in the Magistrates Court by RM Rajasinghe (as he then was) in a ruling on the 21st July 2010.
15. I agree with the magistrate's ruling and would dismiss this alternative application.
16. The applications are dismissed.



P.K. Madigan
Judge

At Suva
5 March 2015